LAMBERTUS VAN GERVAN

v.

ANDREW ARTHUR FENTON

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, DAWSON TOOHEY, GAUDRON AND MCHUGH JJ
[F.C. 92/041]
28 OCTOBER 1992

TORT: Negligence - Measure of damages - Assessment based on services rendered.

The appellant met with an accident resulting from the respondent's negligence which caused him severe psychiatric illness needing constant care. This care was provided by his wife who had to quit her job as a nurses' aide. This appeal was made on the inadequacy of an award for damages and it was submitted that the measure of damages should be the market value of the service that he required and not the loss sustained by his wife.

Held:

By Mason CJ, Toohey and McHugh JJ

The general rule for the market cost or value of services provided gratuitously to an injured person is the fair and reasonable value of such services. The appellant need not show that the need is or may be productive of financial loss. This market cost is the amount which the respondent must pay as damages. The income foregone will usually be irrelevant as the market cost represents the objective value of the services. Also, the reasonable cost of the services need not be the same account as the income foregone by the care provider. The income lost by the provider should not be the basis for measuring the appellant's loss. Moreover the evidence in the present case does not indicate that the nature and duration of the services provided by the appellant's wife as a nurse's aide correspond to that which she provides to the appellant. Consequently the appellant's wife's earnings cannot be the basis for calculating the appellant's damages.

By Brennan J.

If the appellant cannot offer services to the wife in return for her services, pecuniary allowance would be fair compensation to the wife for his failure to do so and damages should be awarded to represent that allowance.

By Gaudron J.

As there is no true or appropriate rate the commercial rate should be adopted for comparable care or services. Hence the rate should be $549 per week as given by the Nursing Agency. It would be necessary to show a difference that is reflected in the rate of remuneration. The proper course is to recalculate the damages and the judgment of the Supreme Court of Tasmania should be set aside.

By Deane and Dawson JJ (dissenting).

The amount awarded by the trial Judge, referring to the wife's past earnings is a fair adequate estimate of the market value of the additional services to be given to the appellant for the next $7^1/_2$ years. An over-generous approach by the Courts to compensation based on the need for gratuitors services may conflict with the interest of the community as a whole.

[Appeal was allowed. The case to be remitted to the trial judge to assess additional damages].

Cases referred to:

Griffiths v. Kerkemeyer [1977] 139 CLR
Nguyen v. Nguyen [1990] 169 CLR
Veselinovic v. Thorley [1988] 1 Qd R
Donnelly v. Joyce [1974] QB
Blundell v. Musgrave [1956] 96 CLR
Johnson v. Kelemic [1979] FLC 90-657
Kovac v. Kovac [1982] 1 NSWLR 656
Maiward v. Doyle [1983] WAR 210
Carrick v. Commonwealth of Australia [1983] 2 Qd R. 365
The National Insurance Co. of New Zealand Ltd. v. Espagne [1961] 105 CLR 569
National Wage and Equal Pay 1972 [1972] 147 CAR 172
Private Hospitals' and Doctors' Nurses (ACT) Award, 1972 [1986] 300 CAR 185
National Wage 1983 [1983] 291 CAR 3
Sharman v. Evans [1977] 138 CLR
Baumgartner v. Baumgartner [1987] 164 CLR 137
Metal Trades Award (re Work Value Inquiry) [1967] 121 CAR 587
Vehicle Industry Award [1968] 124 CAR 295
O'Brien v. Dunsdon [1965] 39 ALJR 78
Planet Fisheries Pty. Ltd. v. La Rosa [1968] 119 CLR 118
Beasley v. Marshall [1985] 40 SASR 544
GIO of NSW v. Planas [1984] 2 NSWLR 671
Water Board v. Moustakas [1988] 62 ALJR 209
Suttor v. Gundowda Pty. Ltd. [1950] 81 CLR 418
University of Wollongong v. Metwally (No. 2) [1985] 59 ALJR 481
Coulton v. Holcombe [1986] 162 CLR 1
Maloney v. Commissioner for Railways (NSW) [1978] 52 ALJR 292

Legislation referred to:
Common Law (Miscellaneous Actions) Act 1986, s. 5 (Tas)
Law Reform (Miscellaneous Provisions) (Amendment) (No. 2) Act 1991 (ACT), s. 33(2)
Motor Accidents Act 1988, s. 72 (NSW)
Transport Accident Act 1986, s. 93(10)(c) (Vict)
Workers Compensation Act 1987, s. 151K (NSW)

Other sources referred to:
Compensation for Loss of Capacity to Work in the Home, Graycar, [1985] 10 Sydney Law Review 528
Counting for Nothing: What Men Value and What Women are Worth, Waring, (1988)
The Hidden Gender of Law, Graycar and Morgan, (1990) Ch. 5
Tort, Winfield and Jolowicz, 10th Edn., (1975), p. 577
(Un) equal Pay for Work of Equal Value, Thornton, (1981) 23 Journal of Industrial Relations 466
Women and the Law, Scutt, [(1990) Ch. 3

For the appellant - Baker Tierney & Wilson
For the respondent - C.G. Woodhouse

JUDGMENT

Mason CJ, Toohey and McHugh JJ.
This appeal is brought against an order of the full court of the Supreme Court of Tasmania which dismissed so much of an appeal by the appellant as concerned the inadequacy of an award of damages for a *Griffiths v. Kerkemeyer* [1977] 139 CLR 161 claim. The question in the appeal is whether, in respect of a *Griffiths v. Kerkemeyer* claim, compensation for the value of the services provided for the appellant by his wife was properly assessed by reference to what she would have earned if she had continued in paid employment.

In *Griffiths*, this court held that a plaintiff was entitled to recover damages for the value of services rendered to him gratuitously by his fiancee and members of his family. The effect of the decision was summarised in *Nguyen v. Nguyen* [1990] 169 CLR 245, per Dawson, Toohey and McHugh JJ. at pp. 261-262 as follows:

> In reaching its conclusion, the court followed the decision of the Court of Appeal in *Donnelly v. Joyce* [1974] QB 454, and viewed the damages in question as damages for one component of the plaintiff's loss occasioned by his physical disability. The disability gave rise to the need for nursing and other care. The need was met by the services gratuitously provided. The value or cost of those services was, in the circumstances, an appropriate means of quantifying that aspect of the plaintiff's loss which was represented by the need. As the need represented the loss, the value of the services required to fulfil that need served as a means of assessing the loss. The fact that there were persons, prompted by motives of concern for the plaintiff, who were prepared to provide the services gratuitously was, it was held, not something which should diminish the damages to the advantage of the defendant. It was only right in the circumstances that the plaintiff should benefit rather than the wrongdoer whose negligence was the cause of the plaintiff's loss.

The factual background

On 7 September 1984, the appellant was involved in a motor vehicle accident which was caused by the respondent's negligence. As a result of the accident, the appellant is in need of almost constant care which has been, and, on the findings of the trial judge, for some time will be, provided at home by his wife. The wife, who had been employed as a nurses aide, gave up that work in 1985 to devote herself to caring for her husband on an essentially full-time basis. She was then earning about $15,000 net per year. The trial judge found that the appellant had a poor short term memory and was unable to manage his own affairs on a day to day or hour to hour basis. His Honour found that, although the appellant was able to visit a nearby friend for a few hours each day, his wife needed to be in the home to care for him for a very large part of the day.

The learned Judge said

> It is no longer practicable for his wife to undertake outside employment, other than on a very spasmodic basis. It has been reasonable for her to gradually limit her employment and to ultimately retire from it. ...
>
> As to the future, the plaintiff will continue to need the same level of assistance. While his wife is able to provide it, she should be furnished with a sum no less than that which she would have received had she continued to work, and

> when she reaches retiring age, ceasing in any event to earn wages, it is just that she suffer no reduction as she will continue to provide the same service. Should she die or be unable to look after the plaintiff, the proper measure of damages, in my view, would be the cost of providing the kind of care such an institution as the Woodhouse Centre offers.

The learned Judge found that the appellant's life expectancy at the time of trial was 13 years. For the purpose of assessing damages, His Honour made a finding that the appellant's wife would care for him for 5 to 10 of those 13 years. Accordingly, His Honour assessed damages on the basis of *Griffiths* as follows:

(1) $54,000 "in respect of past gratuitous nursing care [being] a sum approximating the net wages lost by the plaintiff's wife';
(2) $137,000 in respect of future care on the assumption that his wife would care for him for 5 to 10 years and that he would be hospitalised for the remaining years of his life. The value of the wife's services was assessed at $277 per week (her former net wages less travelling expenses) and the value of the hospital's services at $347 per week.

The full court upheld the trial judge's assessment in respect of these items.

The appellant contends that the approach of the trial Judge was erroneous. He submits that the damages should be assessed by reference to the market value of the services required by him as the result of the respondent's negligence and not by reference to the loss sustained by his wife.

Because the trial Judge made no adjustment for the fact that 5 years had elapsed between the time when the wife ceased employment and the time of trial, his assessment of damages may have been erroneous in any event. However, the question of principle which arises is whether, in this case in particular and in *Griffiths v. Kerkemeyer* claims in general, the care provider's loss is ever an appropriate measure of the injured person's loss.

The applicable principle

Contrary to the judgments in the Supreme Court of Tasmania in this case and the important judgment of the full court of the Supreme Court of *Queensland in Veselinovic v. Thorley* [1988] 1 Qd R. 191, the wages foregone by a care provider are not an appropriate criterion for determining the value of services provided gratuitously to an injured person. As a general rule, the market cost or value of those services is the fair and reasonable value of such services.

In *Griffiths*, the three members of the court (Gibbs, Stephen and Mason JJ.) were unanimously of the view that a plaintiff is not precluded from recovering damages for services voluntarily performed on that person's behalf without any legal obligation on the part of the plaintiff to pay for them. However, the court was divided as to the principle which governed such claims.

Stephen J. accepted that such cases were governed by the principles laid down in *Donnelly v. Joyce* where Megaw L.J., delivering the judgment of the Court of Appeal, said [1974] QB at p. 462:

> The loss is the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant. The plaintiff's loss, to take this present case, is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages for the purpose of the ascertainment of the amount of his loss - is the proper and reasonable cost of supplying those needs. That, in our judgment, is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.

Mason J. also said *Griffiths* [1977] 139 CLR at p. 192 that the law was correctly stated in Donnelly. However, Gibbs J. said *ibid.*, at p. 166 that the decision of this court in *Blundell v. Musgrave* [1956] 96 CLR 73 made it impossible for him to accept all that was said in Donnelly. His Honour thought *Griffiths* [1977] 139 CLR at p. 167 that it was" implicit in the decision in *Blundell v. Musgrave* that if the

plaintiff's injuries created a need for hospital treatment, the loss which sounds in damages is not the need itself, but the cost of satisfying it" Although His Honour said *ibid.*, at p. 168 "that the conclusion reached in *Donnelly v. Joyce* was correct", he thought that the court should not abandon the principle that the plaintiff cannot recover damages unless the satisfaction of the need "is or may be productive of financial loss".

The approach of Gibbs J , however, is inconsistent with the approach of the Court of Appeal in *Donnelly* [1974] QB at p. 462 which Stephen and Mason JJ adopted in *Griffiths*. In *Donnelly*, the Court of Appeal made it clear that the plaintiff's loss was "the existence of the need" The approach of Gibbs J. is also inconsistent with what Stephen J. called *Griffiths* [1977] 139 CLR at p. 178 "the principle that it is for the plaintiff's loss, represented by his need, that damages are to be awarded" and with the statement of Mason J. *ibid.*, at p. 168 that the plaintiff's "relevant loss is his incapacity to look after himself as demonstrated by the need for nursing services".

Thus, the important difference between the judgment of Gibbs J and the judgments of Stephen and Mason JJ in *Griffiths* is that, while Stephen and Mason JJ were of the opinion that the plaintiff's damages are to be calculated by the need for the services, Gibbs J thought that that was a necessary but not a sufficient condition of liability. In the opinion of Gibbs J. *ibid.*, at p. 168, the satisfaction of the need is not sufficient unless the need "is or may be productive of financial loss". But to add this requirement is to go as close as is possible to treating the claim as a claim for special damages. Yet the *Griffiths v. Kerkemeyer* doctrine was only made possible by rejecting the established common law rule that, in an action for damages for tort, the reasonable cost of services required as the result of the tort is a claim for special damages and can only be recovered if the plaintiff has a legal (or perhaps a moral or social) obligation to pay for them *Blundell* [1956] 96 CLR, at pp. 79-80, 92. As Stephen J pointed out in *Griffiths* [1977] 139 CLR, at p. 179 the principle laid down in *Donnelly* "deprives of all substantive significance the distinction between special and general damages: if a plaintiff's accident-caused need is the loss to be compensated, the reasonable cost of satisfying that need being only a means of quantifying the damages to be awarded, the distinction between these two kinds of damages becomes unreal".

Although the judgment of Gibbs J in *Griffiths* has frequently been cited as though it contained the *ratio decidendi* of *Griffiths* see *Johnson v. Kelemic* [1979] FLC 90-657; *Kovac v. Kovac* [1982] 1 NSWLR 656; *Maiward v. Doyle* [1983] WAR 210; *Carrick v. Commonwealth of Australia* [1983] 2 Qd R. 365, it was a dissenting judgment on the point of principle. Significantly, in *Nguyen* [1990] 169 CLR, at p. 262, Dawson, Toohey and McHugh JJ interpreted *Griffiths* as holding that "the plaintiff's loss ... was represented by [his] need".

Consequently, it should now be accepted that the true basis of a *Griffiths v. Kerkemeyer* claim is the need of the plaintiff for those services provided for him or her and that the plaintiff does not have to show, as Gibbs J held, that the need "is or may be productive of financial loss".

Income foregone is not the test of reasonable value

Once it is recognised that it is the need for the services which gives the plaintiff the right to an award of damages, it follows that the damages which he or she receives are not determined by reference to the actual cost to the plaintiff of having them provided or by reference to the income foregone by the provider of the services. As Stephen J. pointed out in *Griffiths* [1977] 139 CLR, at p. 178, the principle laid down in *Donnelly* "is concerned not with what outlays of money the plaintiff will in fact incur as a consequence of his injuries but with the objective monetary 'value' of his loss'. Because the market cost of services is ordinarily the reasonable and objective value of the need for those services, the market cost, as a general rule, is the amount which the defendant must pay as damages see *ibid.*, per Mason J. at p. 193. But in some cases the market cost may be too high to be the reasonable value of the services. Where, for example, the cost of providing the services at a remote location is much greater than providing those services in a densely populated area, it might be necessary to discount the market cost or value of the services needed by the plaintiff on the ground that the market cost or value was unreasonable in the circumstances. In other cases, there may be so little competition to provide the

services that, judged objectively, the market cost is not the reasonable value of the services. No doubt the circumstances of particular plaintiffs may reveal other cases where the market cost of the services provided is not the reasonable value of the services reasonably needed. But the case will be rare indeed where the income foregone by the care provider is ever an appropriate guide to the fair value of the services required by the injured person. Whether the income foregone is below or above or equivalent to the market cost, the income foregone will usually be irrelevant, for the market cost will ordinarily represent the objective value of the services. Where there is no relevant market for the services or the market cost is objectively too high to be reasonable, the income foregone may be a starting point in cases where the nature and duration of the services provided and the previous work and hours of the care provider are roughly comparable, but such cases are likely to be rare.

At first sight, there may appear to be an inconsistency between the case of a plaintiff who has services performed at a price below market cost and the case of a plaintiff who has services performed gratuitously by a person who has given up employment and lost an income which is lower than the market cost of the services. It is true that, where the plaintiff has entered into a binding agreement for the provision of the required services, the defendant's liability is confined to the contractual cost of the services unless the cost exceeds the reasonable cost of the services. In such a case, the defendant and not the plaintiff obtains the benefit of any bargain which the plaintiff has acquired in obtaining the services at below market cost. But there is no valid analogy between that case and the case of services gratuitously provided by a person who has given up employment to perform those services. The person who has entered into a binding agreement is bound to perform the services required for the period agreed. However, the gratuitous provider of services is not bound to continue to provide the services. Moreover, it will be a rare case where the nature and duration of the services provided and the nature and duration of the work given up are comparable.

It is also true that, in *Donnelly*, the loss of wages foregone by the plaintiff's mother was taken by the court of appeal as the reasonable value of the services which she performed for the plaintiff, but that case was fought on that basis. In *Griffiths,* Mason J. said *ibid*:

> In *Donnelly v. Joyce* the value of the nursing services provided by the mother was calculated by reference to the wages which she had sacrificed by giving up her employment and the damages were assessed on this footing. But the case does not decide that this is the true measure of the relevant head of damage. The decision is, I think, to be explained on the ground that the case was conducted on the footing that if the damages were recoverable in respect of the nursing services provided by the mother they were to be calculated by reference to the wages which she had sacrificed. **In general the value or cost of providing voluntary services will be the standard or market cost of the services**. (emphasis added)

Stephen J. was also at pains to explain *ibid.*, at pp. 180-181 that *Donnelly* had been conducted on the basis that the measure of the plaintiff's loss was the wages which his mother had lost by reason of her providing the services to him. Adopting a statement in Winfield and Jolowicz on Tort 10th Edn., (1975), p. 577 he pointed out that the reasonable cost of the services was not necessarily the same amount as the income foregone by the care provider.

Moreover, there are sound policy reasons why the law should reject the income lost by the provider as the criterion for measuring the plaintiff's loss. First, fairness to the provider as well as to the plaintiff requires that the plaintiff should have the ability to pay the provider a sum equivalent to what the provider would earn if he or she was supplying those services in the marketplace. It does not seem reasonable that the defendant's liability to pay damages should be reduced at the indirect expense of the provider by invoking notions of marital or family obligation to provide the services free of charge or at less than market rates. Yet post-*Griffiths* awards have been reduced on this or similar theories see *Johnson v. Kelemic; Kovac v. Kovac Carrick v. Commonwealth of Australia.* Moreover, a plaintiff should bo entitled to arrange his or her affairs in the way in which that person pleases and should not be constrained by monetary considerations

from dispensing with gratuitous services and obtaining outside services if they are desired. Indeed, the relationship between the provider and the plaintiff may continue to exist in some cases only because outside help is able to be obtained.

Secondly, since there is no binding agreement with the provider to continue to provide the services, the court would have to make a finding as to whether the care would continue to be provided and, if so, for how long. The task of reliably determining whether a person will continue to provide personal services on a voluntary basis is much more difficult than the task of determining the traditional types of hypotheticals which come before the courts in damages cases, such as whether a plaintiff is likely to obtain employment or whether a medical condition is likely to improve or worsen. The relationship between the parties may end for any of the myriad reasons which bring about the end of relationships. But the predictability of a relationship continuing in this class of case is made more difficult than usual by the effect that the plaintiff's condition and needs have or may have on the emotional needs of those involved in caring for him or her. There is also the prospect that the care provider will not reveal to the court his or he true feelings about continuing to provide the services even in cases where the provider is conscious of those feelings. It is true that any assessment of damages may be falsified by the occurrence of what the courts have called "the vicissitudes of life". But the common law should seek to reduce where possible, the uncertainty involved in the assessment of damages. The use of the market cost criterion enables the plaintiff to be properly compensated by the award of a reasonable sum whether or not the gratuitous care provider continues to provide that care. In the present case, the foundation of the judgment is the finding that the appellant's wife will continue to provide the services. If she should fail to do so for any reason, the basis of the assessment would be inoperative.

In *Veselinovic*, in dealing with the case of a wife who required services which were provided gratuitously by her husband, Thomas J. said [1988] 1 Qd R., at pp. 199-200:

> The question arises whether this particular assessment should allow the notional cost of hiring of outside labour, or whether it should reflect the loss to the husband who actually supplied the services. ...
>
> Where sacrifice is involved in the action of the provider, or where onerous services are provided by a person who has little earning capacity, the provider's loss will usually be an inadequate measure of damage. It would be less than a reasonable amount to satisfy the plaintiff's need for such services, and this affords the special reason why damages are assessed at a higher level than the small loss that can be proved. Frequently the cost of outside help affords a touchstone in evaluating such damage, although its artificiality may be good grounds for discounting it and I agree with Derrington J. that the fact that a person provides such services in his own home is further ground for discounting it. But in a case involving a provider who does not fall into the 'gratuitous' class, that is to say a person who is normally a member of the workforce and whose loss of remuneration is said to be the measure of damage, the position may be more simple. When services are obtained from such a provider who is ready willing and able to supply them, and when that person incurs a smaller loss than the cost of engaging outside help, then the provider's loss should *prima facie* be the measure of the plaintiff's loss. One way of looking at the matter is to say that there is no reason for a greater sum to be awarded than the economic consequences to such a provider, because no greater loss has occurred, and there is no special reason for increasing the damages. Another is to regard it as an aspect of the plaintiff's duty to mitigate. Where such a cost is less than the cost of outside help, then the realities of the case are that the plaintiff's need had actually been satisfied by such services and there is no reason why the compensation should exceed the actual loss of the provider of the services.

With great respect to His Honour, the passage set out above does not represent the law in Australia for the reasons we have given. Moreover, it seeks to draw a distinction between the gratuitous provider of services who has lost no

income or has little earning capacity and the gratuitous provider of services who has been in employment. But the distinction would lead to the result that, where the provider of the services had had no income, the plaintiff would obtain damages comparable to the market cost of the services because there is no other criterion. Where the provider of the services has given up employment to provide the services, however, the plaintiff would obtain damages equivalent to the income foregone by that person, provided that it does not exceed the market cost of the services. Such a distinction cannot be supported in principle once it is accepted that the damages are awarded on the basis of the objective value of the services which the plaintiff reasonably needs. To give the plaintiff damages equivalent to the lost income of the provider of the services when that person has been in employment is to substitute an arbitrary sum for the reasonable value of the services.

Moreover, once it is accepted that the claim is not one for special damages, no separate question of mitigation by the plaintiff arises in respect of the provision of the services. In *Griffiths*, Gibbs J. said [1977] 139 CLR, at p. 164 that there was a duty to mitigate, but he was speaking in a context where the income foregone was greater than the market cost of the services. But once it is accepted that the plaintiff is compensated for his or her loss and that the reasonable value of that loss is in general the market cost of providing the services, matters which might on a different theory be dealt with on the issue of mitigation are subsumed under the issue of the reasonable value of the services needed.

The application of the principle in this case

In a case such as the present, therefore, it is necessary to determine two questions:

(a) What are the services required to satisfy the plaintiff's need resulting from the defendant's wrong?
(b) What is the value of those services?

In this case, the appellant's need is essentially for constant care and attention. No doubt some of the services which are now needed by the appellant were provided for him by his wife before the accident. But with great respect to those judges who have taken the contrary view see for example, *Johnson v. Kelemic; Kovac v. Kovac; Maiward v. Doyle; Carrick v. Commonwealth of Australia*, no allowance in favour of the respondent can be made for such matters. A defendant is no more entitled to have the pre-accident voluntary contribution of a spouse taken into account than a defendant would be entitled to have the pre-accident work of a paid housekeeper taken into account. If the defendant has created the need for the services, that person is not entitled to have the damages reduced because, before the accident, the plaintiff elected to pay for similar services or had the benefit of having them performed gratuitously. By the tort, the defendant has transformed the choice of the plaintiff to pay for such services or to have them done voluntarily into the need for the plaintiff to have those services performed for him or her. If the defendant was entitled to credit in respect of services which had been provided for the plaintiff before the accident (either gratuitously or by contract), plaintiff would receive a smaller amount of damages than a plaintiff, with the identical need, who had not had any services performed for him or her. It would not be consistent with the law relating to third party arrangements to distinguish between the plaintiff who, before the accident, had none of the services performed for him or her and the plaintiff who, before the accident, either paid for, or had performed gratuitously, some of those services see *The National Insurance Co. of New Zealand Ltd. v. Espagne* [1961] 105 CLR 569.

At the trial, the parties agreed on the cost of providing full-time home nursing care by a non-medically trained person. Nevertheless, both the trial Judge and the full court thought that the value of the services required by the appellant was to be assessed by reference to the pre-injury earnings of his wife. In doing so, Their Honours relied on the judgment of Thomas J. in *Vaselinovic* [1988] 1 Qd R., at pp. 199-200.

If the nature and duration of the services provided by the appellant's wife in performing her job as nurses' aide corresponded with the nature and duration of the services provided by her to the appellant, her loss of earnings might reasonably form a starting point for the calculation of the appellant's damages. But this would be because, in those circumstances, the appellant's wife's earnings, as a nurses' aide, would provide some evidence of the market value of the services provided to the appellant.

However, the evidence does not indicate that the nature and duration of the services provided by the appellant's wife as nurses' aide correspond with the nature and duration of the services which she provides to the appellant. Indeed, the evidence is to the contrary. While many of the services provided to the appellant may have been of the kind provided by a nurses' aide, the appellant's wife worked as a nurses' aide for only 40 hours per week. Her attendance on her husband is virtually constant. She has lost her freedom to work where she pleases and she is confined to the matrimonial home for long periods. She has also lost her freedom to engage in social and other activities outside her home after ordinary working hours. With great respect to the learned Judges in the Supreme Court of Tasmania, the nature and duration of the services provided by the appellant's wife to the appellant are not comparable with the nature and duration of the services for which she was paid as a nurses' aide. Consequently, the appellant's wife's earnings in this case provided no reasonable basis for the calculation of the appellant's damages. To the extent that the trial Judge and the full court of the Supreme Court relied upon those earnings, they were in error.

It is an agreed fact that the rates currently charged by an agency which supplies homo nursing care by a non-medically trained person comprise $40 per day wages with time and a half rates for Saturday and double time rates for Sunday plus a 20 per cent loading in lieu of annual leave, sick leave and public holidays, together with an annual workers' compensation premium of $50. When this is combined with the approximate cost of board and lodging for a live-in housekeeper of $20 per day, the approximate market rate applicable is $549 per week. It should be accepted that that rate applies in relation to a full-time carer as opposed to someone working a 40 hour week. Regrettably, the services provided in return for the payment of such a rate were not the subject of evidence; so no comparison can be made between the services that would be rendered by a full-time carer and those services provided by the appellant's wife in this case.

Because of the evidentiary difficulties, it would be inappropriate for this court to assess the appellant's damages. The appeal should be allowed, and the judgment of the full court set aside In lieu thereof, the matter should be remitted to the trial judge to hear further evidence and to assess such additional damages as the appellant may be entitled to in accordance with the principles expressed in this judgment

Brennan J.

I am in general agreement with what Mason C.J., Toohey and McHugh JJ. have written, subject to one qualifying factor that arises when an injured plaintiff and the person who provides care for him or her are living together as husband and wife or in some other personal and permanent relationship. In such a case, a question arises as to whether the spending of time together and the provision of other minor services of the kind that were incidental to their relationship before the injury (hereafter "those services") should be the subject of pecuniary compensation when the plaintiff's injury creates a need that is satisfied by those services. The question is not easily solved. On the one hand, it can hardly be said that the provision of those services is to be attributed to the need created by the plaintiff's injury when those services would have been provided to the plaintiff, whether or not he or she had a need for them. On the other hand, the rendering of those services in such a relationship is usually mutual and the injury may well have deprived the service provider of the mutual services which the injured plaintiff would have rendered to her or him. The former consideration tends against inclusion in the award of a sum corresponding to the market cost of providing those services; the latter consideration shows that, if nothing were allowed in respect of the provision of those services, the plaintiff must be made to depend on the self-sacrifice of the care provider to answer some of the needs created by the injury.

The assessment of damages, though governed by principles which are calculated to provide the plaintiff with full and fair compensation in respect of the needs created by the tortious infliction of injury, is necessarily imprecise. It is impossible to quantify with any pretence at precision the net benefit to an injured plaintiff of the company and minor services that he or she would have enjoyed by reason of the personal relationship between the plaintiff and the care provider or to put a value on the company and services which the plaintiff would have provided to the care provider by reason of their personal relationship if the plaintiff had

not suffered the injury. In my view, the only way to take this factor into account is this: it is appropriate to omit from the list of services to be paid for by the defendant some of the time spent or some of the minor services rendered by the care provider to the plaintiff where those services would have been provided in any event as an incident of an antecedent personal relationship between them, provided the plaintiff is able to offer services to the care provider in return. If the plaintiff is unable to offer services to the care provider in return, but some pecuniary allowance would be fair compensation to the care provider for the plaintiff's failure to do so, the plaintiff should recover as damages a capital sum representing that allowance - assuming that sum does not exceed the market value of those services provided to the plaintiff by the care provider. The allowance, if any, to be made in respect of this factor may not admit of precise calculation.

Subject to this observation, I agree with Mason C.J., Toohey and McHugh JJ. and with the order that Their Honours propose.

Deane and Dawson JJ.

The question involved in this appeal is whether the full court of the Supreme Court of Tasmania (Green CJ, Wright and Crawford JJ.) was in error in confirming the decision of the learned primary Judge (Cox J.) in so far as it included in the damages awarded to the appellant an amount of $137,000 to take account of his need for "[f]uture nursing care". The appellant argues that that amount was unduly low for the reason that the component of it which was referable to the period of 7 1/2 years following the trial was ascertained by reference to the amount which would have been earned by the appellant's wife if she had remained in the full-time employment (as a nurses' aide) which she relinquished so that she could look after the appellant. No attack was made in this court upon the trial Judge's finding that the appellant's wife would attend to the appellant's needs during that period. The appellant's argument is that, in the circumstances of the present case, that component of the award of damages for future nursing services should have been calculated by reference to the market value of the services of a full-time live-in housekeeper calculated on the basis of a seven-day working week with time and a half rates for Saturdays and double time for Sundays.

The basis upon which the appellant was entitled to damages in respect of "[f]uture nursing .... was his entitlement to be compensated for any loss of capacity to look after himself which was caused by the accident see *Griffiths v. Kerkemeyer* [1977] 139 CLR 161, at pp. 178, 192; *Donnelly v. Joyce* [1974] QB 454, at p. 462 In a case such as the present where the accident-caused loss of capacity which makes it necessary for an injured plaintiff to be assisted for ordinary living purposes by the services of others, the reasonable cost or commercial value of services which are or will be provided or obtained to attend to the plaintiff's accident-caused needs constitutes a *prima facie* reference point for quantifying the additional injury (that is, over and above pain, suffering and loss of enjoyment of life) represented by that loss of capacity. In that regard, compensation will ordinarily not be payable to an injured plaintiff in respect of services which were or would have continued to be provided without charge to him or her in any event. Thus, for example, an injured person whose injuries required constant supervision would not be entitled to damages in respect of the commercial value of supervisory services which are, and would have been in any event, provided by the supervisors of a public institution of which he or she is and would in any event have been a non-paying resident. On the other hand, the fact that any additional services necessary to accommodate the plaintiff's accident-caused needs are or will be gratuitously provided by a relation or friend will not prevent the commercial value of those services from being taken into account in assessing damages for the relevant loss of capacity. Thus, in *Gifiths v. Kerkemeyer* [1977] 139 CLR 161 this court held that the fact that "nursing services" necessary to care for a quadriplegic had been and would be gratuitously provided by a relative or friend did not preclude regard being had to the market value of those services in assessing damages for the injury sustained by the accident-caused loss of capacity. It is true that that approach blurs, and goes very close to extinguishing, any distinction between general damages for loss of capacity and special damages for outgoings which have been or will be actually incurred as a result of the accident. As Stephen J. pointed out in *Griffiths v. Kerkemeyer* [*ibid.*, at p. 179, however, the distinction between special and general damages has little conceptual relevance to torts such as negli-

gence where identified special damage is not a prerequisite of the cause of action.

In the present case, there is no challenge to the trial Judge's finding that, from the point of view of both appellant and respondent, it was reasonable that the appellant's wife give up her full-time employment to provide the additional services necessary to attend to the appellant's accident-caused needs during a period which would, on the probabilities, extend until about 7 1/2 years after the conclusion of the trial. That meant that the appellant was entitled, in the assessment of the amount which represented adequate compensation for his accident-caused loss of capacity, to have account taken of the commercial value of those additional services. The nature and extent of the overall care and attention which would, on the evidence, be provided by the wife during that 7 1/2 year period were succinctly identified, in the full court, by Green C.J. as follows:

> Although the care is being provided by the appellant's wife over a longer period than 40 hours per week she is not constantly providing care for the whole of that period and much of the care she provides does not require constant activity on her part. The evidence shows that she is able to leave the appellant alone for periods of the order of an hour or more and that much of the time all that she is doing is low level supervision or simply attending to her own affairs albeit ensuring that she is nearby and 'on call' in case she is needed.

The evidence established that some of the services which would be provided by the appellant's wife were provided by her before the accident and would have continued to have been provided by her if the accident had not occurred. Such services included, for example, most of the domestic cooking, washing and vacuuming. In addition, as the above extract from Green C.J.'s judgment indicates, the very presence of the appellant's wife in the home attending to her own affairs would constitute a kind of "low level supervision" which made the engagement of outside services for such "supervision" unnecessary.

The assessment of damages for personal injuries in a negligence action is not an exact science. It must always be governed by considerations of practical common sense in the context of the circumstances of the particular case. It may be that, if the appellant had not been married, it would have been reasonable, for the purposes of assessing damages, for him to have continued to live at home and to have employed the services of a seven-day-a-week live-in housekeeper to attend to his accident-caused needs during the period of 7 1/2 years following the trial. The facts of the matter were, however, that the appellant was and was likely to remain a party to a stable marital relationship and that the ordinary incidents of that relationship and the give-and-take activities of the parties to it provided a significant part of the active services and passive attendance in and about the matrimonial home which were necessary to look after the appellant's accident-caused needs. In assessing compensatory damages in that context, the ordinary incidents of a particular continuing relationship, such as joint activities and companionship, cannot, in our view, legitimately be seen as transformed by the injury to one spouse into "services" rendered or to be rendered by the other spouse even if they obviate a need for such "services" which would otherwise exist. Nor, subject to an important qualification, can domestic services which are undertaken, as part of the mutual give-and-take of marriage, by persons in a marital relationship for the benefit of one another and of their matrimonial establishment, legitimately be seen as converted into **additional** services necessary to attend to the accident-caused needs of an injured plaintiff in circumstances where they would have been performed in the same way and to the same extent in any event. The qualification is that such services will be taken out of the area of the ordinary give-and-take of marriage to the extent that the injuries to the wife or husband preclude her or him from providing any countervailing services. To that extent, the continuing gratuitous services provided by the spouse assume a different character and should be treated as additional services which have been or will be provided by that spouse to look after the accident-caused needs of the injured plaintiff.

It is clear that, in the present case, the additional services which are being and will be provided by the wife to attend to the appellant's accident-caused needs during the relevant period are very extensive. They involve both active care and protective attention to an extent that represents an oppressive restraint

upon the wife's freedom of activity. It was clearly reasonable that the appellant's damages for loss of capacity include a substantial amount calculated by reference to the value of those additional services and that, in ascertaining the extent of the wife's additional services, account be taken of the drastic curtailment of the appellant's ability to do things for his wife (and himself) in return. Nonetheless, it would be illegitimate to treat the burden of additional care which the wife has assumed in the context of a devoted marriage and in the environment of her own home as converting her into the equivalent of a full-time live-in housekeeper to be remunerated not only for the active services which she renders to her husband but on the basis that time spent with her husband in her own home is to be treated as if it were services rendered to a stranger in a strange environment. On the other hand, as Green CJ and Crawford J. pointed out in the full court, the value of the plaintiff's additional services could not be directly equated to the income which the wife would otherwise have earned in her previous employment as a nurses' aide. For one thing, the hours, quality and intensity of the plaintiff's work as a nurses' aide greatly differed from what was involved in her care of the appellant. For another, the appellant's wife did not completely give up outside work when she resigned but has continued to do occasional work as a nurses' aide on a casual basis. During the three complete financial years between her resignation from full-time employment with the Huon District Hospital (March 1986) and the trial (November 1989), the appellant's wife earned an average of about $2000 per year (before tax) from casual employment as a nurses' aide with Huon Eldercare. Nonetheless, it appears to us that, in the particular circumstances of this case, the amount awarded by Cox J. by reference to what the appellant's wife had earned in the past from her full-time employment as a nurses' aide represents a fair and adequate estimate of the market value of the additional services which would be provided by her to look after the appellant's accident-caused needs during the relevant period of 7 1/2 years. As Green CJ pointed out:

> The appellant's wife's work as a nurse's aide would have demanded a higher level of skill than is required to look after the appellant and of course when she was employed she was obliged to work constantly for fixed periods each day. To an extent the longer hours she now has to work are compensated for by the fact that the work involved in caring for the appellant is less constant and involves a lower level of less skilled activity than she performed as a nurses' aide so that it is not unreasonable to regard the wages she was paid as roughly comparable to what is fair compensation for the services she is now providing.

In making the above comments, Green CJ was, no doubt, conscious of the residual extent to which the appellant retained his mobility and underlying intelligence and remained capable of going out with his wife, visiting others and sharing companionship with his wife and others: he could be left alone for periods of an hour or more; he could go out with his wife, for purpose such as shopping, for short periods; he walked to visit a nearby friend for a few hours each day; another person visited on Friday evening between 7.30 p. m. and 10.30 p.m.

It can, of course, be argued that there is an element of unfairness in the approach that the companionship and some of the services provided by the appellant's wife as an ordinary incident of their marital relationship should have the effect of reducing the liability of the "wrongdoer" whose negligence caused the appellant's injuries. With due respect to those who see the matter differently, however, it appears to us that the notions of fairness which support account being taken, in the assessment of compensation, of **additional** services which are gratuitously provided to attend to a plaintiff's accident-caused needs are not compelling in relation to services and companionship which would have been provided in any event as an incident of a pre-existing and continuing relationship. In that regard, one cannot but be conscious of the unreality involved in speaking of what is fair in a road accident case in terms which would be appropriate if the negligent defendant or "wrongdoer" was personally bearing the burden of any verdict. In fact, of course, it is the community generally, or that section of it which consists of the owners of motor vehicles, which bears that burden. Were it otherwise, a plaintiff's verdict for serious injuries would be likely to be left unsatisfied. It is also relevant to note the fact that some legislatures, including the parlia-

ment of Tasmania see Common Law (Miscellaneous Actions) Act 1986 (Tas.), s. 5; and see, also, Transport Accident Act 1986 (Vict.), s. 93(10)(c); Workers Compensation Act 1987 (NSW), s. 151K; Motor Accidents Act 1988 (NSW), s. 72; and cf., Law Reform (Miscellaneous Provisions) (Amendment) (No. 2) Act 1991 (ACT), s. 33(2). have legislated to reverse the decision in *Griffiths v. Kerkemeyer*. This is an indication that an over-generous approach by the courts to compensation based upon the need for services which are provided gratuitously may be seen to conflict with the interests of the community as a whole. We would dismiss the appeal.

Gaudron J.

The appellant, Lambertus Van Gervan, suffers from a severe psychiatric illness which makes it impossible for him to care for himself. That illness results from a car accident which occurred on 7 September 1984. The psychiatric illness developed some little time later and, since then, Mr. Van Gervan has been cared for by his wife, except for short periods spent in hospital or in other care institutions.

It is expected that, with periods of respite, Mrs. Van Gervan will continue to care for her husband for some time to come. It is common ground that if, for any reason, she is unable or unwilling to provide that care, it will be necessary for him to be admitted to a clinic or some similar institution on a permanent basis. The issue in this appeal is the proper measure, in money terms, of his need for care, other than institutional care.

On the trial of his action for damages in the Supreme Court of Tasmania, Cox J. found that Mr. Van Gervan needed constant care which required "his wife to be present in the home, if not every hour of the day, certainly for a very large part of it". It is implicit in his Honour's finding and common ground in this appeal that, by reason of his fear of strangers, Mr. Van Gervan can only be cared for by his wife or in an institution.

Damages were calculated by Cox J. at $357.447.80 and judgment entered for Mr. Van Gervan in that sum. The damages included an amount of $54,000 for care provided pre-trial and an amount of $137,000 for future care requirements. The amount of $54,000 was calculated on the basis of the net wages less travelling expenses which Mrs. Van Gervan would have earned if she had not given up her employment as a nurses' aide to care for her husband. The amount of $137,000 was calculated on the basis that Mrs. Van Gervan would care for her husband for a further 7 1/2 years and that, thereafter, he would be permanently institutionalized. In that calculation His Honour allowed $277 per week for the period during which it was expected that Mrs. Van Gervan would provide her services and $347 per week for the period thereafter. His Honour identified the amount of $277 as "the amount of the lost weekly wages of the plaintiff's wife (after allowing for both tax and travelling expenses)".

An appeal to the full court of the Supreme Court of Tasmania was partially successful, but not on the point with which this appeal is concerned. It was contended in this court, as it was in the full court, that the calculation of damages for Mr. Van Gervan's need for care, other than institutional care, should have been made on the basis of the commercial rate for live-in care provided by a non-medically trained carer and not on the basis of Mrs. Van Gervan's past earnings. It was agreed at the trial that that commercial rate was $549 for a seven day week, involving, it seems, round-the-clock availability.

It was accepted in *Griffiths v. Kerkemeyer* [1977] 139 CLR 161 that damages can be recovered with respect to care or services provided gratuitously. I say "with respect to" because the real loss for which damages are awarded is the loss which gives rise to the need for care or services. In this respect I adopt the reasons of Mason CJ, Toohey and McHugh JJ and Their Honours' conclusion that "the true basis [for compensation] is the need of the plaintiff for those services provided for him and ... the plaintiff does not have to show ... that the need 'is or may be productive of financial loss'" But cf. *ibid.*, at p. 168 per Gibbs CJ. who was of the view that this was necessary before the plaintiff could recover. What follows from this is that compensation for that need must be calculated by reference to the value of the services concerned.

An enquiry as to the value of care or services is not one that is satisfied by having regard to what the care or service provider could or would have earned in some other capacity, including in his or her previous employment

However, as Mason CJ, Toohey and McHugh JJ allow in this case, it may be relevant to have regard to previous earnings if the work involved is roughly comparable with the services provided and there is no genuine market rate to which regard can be had. And the same considerations apply if there is simply no comparable commercial rate.

The valuation of work is neither an exact science nor an exercise that proceeds by reference to objective and non-controversial criteria. Certainly, there is a degree of controversy as to the true value of work that is usually perceived as "women's work", whether that work is done in the home or in the paid work force in relation to the value of women's work in the paid workforce, see *National Wage and Equal Pay* Cases 1972 [1972] 147 C.A.R. 172, at pp. 179-180; *Private Hospitals' and Doctors' Nurses (A.C.T.) Award,* 1972 (1986] 300 C.A.R. 185, at p. 188; *National Wage Case* 1983 [1983] 291 C.A.R. 3, at p. 31. And see, generally, Scutt, Women and the Law, [1990], Ch. 3; Graycar and Morgan, The Hidden Gender of Law, [1990], Ch. 5; Thornton, "(Un) equal Pay for Work of Equal Value", [1981] 23 Journal of Industrial Relations 466. With respect to women's work in the home having an economic value, see *Sharman v. Evans* [1977] 138 CLR 563, per Murphy J. at p. 598; *Baumgartner v. Baumgartner* [1987] 164 CLR 137, per Mason C.J., Wilson and Deane JJ. at pp. 149-150 and see, generally, Graycar, "Compensation for Loss of Capacity to Work in the Home", [1985] 10 Sydney Law Rewiew 528; Waring, Counting for Nothing: What Men Value and What Women are Worth, [1988]. In broad terms, work is valued by having regard to the general nature and range of the tasks and responsibilities involved and the level of skill and training required see, for example, the factors identified in the Australian Conciliation and Arbitration Commission in cases such as *Metal Trades Award (re Work Value Inquiry)* [1967] 121 CAR 587, at p. 753 and *Vehicle Industry Award* [1968] 124 CAR 295, at p. 308 as being relevant to a determination of work value. These factors include: qualifications,, training, attributes required in performance of job (including mental and physical effort and dexterity), responsibility, the conditions of work, the quality of work required, versatility and adaptability, acquired knowledge, supervision of others, ability to work without supervision, by identifying work which is broadly comparable with the work in question and, then, by making a value judgment as to the comparative worth of one in relation to the wages or salary generally paid for the other. It is an exercise in which regard is usually had to the general range of tasks to be performed, rather than their precise detail. Of course, it may be necessary to have regard to the precise tasks involved when wage rates are fixed for establishments whose workforce is organized hierarchically or according to different tasks or classifications. However, even in establishments of that kind, there is sometimes a tendency to "broadband" or to value according to a general range of roughly similar tasks, rather than to differentiate on the basis of the precise tasks involved in different jobs.

It was not suggested that a full work value enquiry should be carried out whenever a question arises as to the value of care or services in respect of which compensation is claimed. Nor was it suggested that that question requires expert evidence. Obviously and like many other questions involved in the assessment of damages, it has to be answered by adopting a broad approach in which regard is had to general community standards see, with respect to damages for pain and suffering and loss of enjoyment of life, *O'Brien v. Dunsdon* [1965] 39 ALJR 78, per Barwick CJ., Kitto and Taylor JJ. at p. 78; *Sharman v. Evans* [1977] 138 CLR., per Murphy J. at p. 595; and see, generally, *Planet Fisheries Pty. Ltd. v. La Rosa* [1968] 119 CLR 118, per Barwick CJ., Kitto and Menzies JJ. at p. 125. And, save where there is no true rate or no appropriate rate to which regard can be had, that will ordinarily involve the adoption of the commercial rate for generally comparable care or services *Griffiths v. Kerkemeyer* [1977] 139 CLR, per Mason J. at pp. 192, 193. See also *Nguyan v. Nguyen* [1990] 169 CLR 245, per Dawson, Toohey and McHugh JJ at p. 262; *Beasley v. Marshall* [1985] 40 SASR 544, per Lunn AJ at p. 565; *GIO of NSW v. Planas* [1984] 2 NSWLR 671, at pp. 676-677; *Carrick v. Commonwealth of Australia* [1983] 2 Qd R. 365, per Shepherdson J. at p. 371; *Kovac v. Kovac* [1982] 1 NSWLR 656, per Reynolds JA at pp. 658-659, although there may be cases where that rate should be adjusted up or down because of some difference which affects the value of the care or services provided.

At trial the parties submitted an agreed statement of facts, one of the agreed facts being the rate charged by the Bay Nursing Agency ("the Agency") for home nursing care by a non-medically qualified person. As already indicated, that rate was $549 per week. Implicit in the parties' submission of that fact as an agreed fact was their acceptance that the services provided by Mrs. Van Gervan were generally comparable with those provided through the agency at that cost. Were that not so, the agreed fact would have no more relevance to the issue which had to be decided than, for example, the wage rates of lion tamers or oceanographers.

Of course, the value of the services provided by Mrs. Van Gervan was not established conclusively by the parties' implicit acceptance that those services were generally comparable with those provided for $549 per week through the agency. It was open to them to lead evidence to establish that the rate charged by the agency was not a true rate because, for example, it was affected by some local economic factor. Or they may have elicited evidence to show that, although the services provided by Mrs. Van Gervan were generally comparable with those provided through the agency, they were different in some specific respect which warranted some increase or reduction in that rate. As Mason C.J., Toohey and McHugh JJ. point out, a difference of that kind is not established by "notions of marital or family obligation". And to establish a difference of that kind, it would be necessary, having regard to the way in which work is usually valued, to show something more than a difference in the number or detail of the tasks involved: it would be necessary to establish a difference of a kind that is normally reflected in the rate of remuneration, as, for example, something different in the nature of the tasks requiring different skills or a different level of training. No attempt was made at the trial to establish a difference of that kind, nor was it put that the rate charged by the agency was not a true market rate.

In this court the case for the respondent accepted that the rate charged by the agency was the proper commercial rate for services of the kind provided by Mrs. Van Gervan but, it was said, it was not appropriate to adopt that rate as the basis for compensation because regard should be had to "the specific person who is delivering the care", the fact that it is provided "in her own home", and that "she is not required to attend the house other than in the times when she would ordinarily be there in respect of some of the hours of the day".

The argument that it was proper to have regard to the fact that the services were being provided by Mrs. Van Gervan in her own home was put on the basis that, to the extent that she was providing some domestic services before Mr. Van Gervan became ill, the need for which he should be compensated was only for those services that were not previously provided by her. The assumption that a paid carer would take over the domestic services previously provided by Mrs. Van Gervan can be put aside because the argument suffers from a more fundamental defect.

There are only two bases on which it can be argued that some reduction should be made by reason that Mrs. Van Gervan provided domestic services before her husband became ill. The first is that, to the extent of the services previously provided, there was a pre-existing need and, thus, no need resulted from the accident. That assumes that the services were provided because they were needed and not as part of the give-and-take usually involved in domestic arrangements. There is no justification for an assumption of that kind, involving, as it does, incompetence and selfishness of a very high order. The second basis on which the argument can be put is that the accident would have given rise to a need for the services of a wife, but to the extent that Mr. Van Gervan already had the services of a wife, no need actually resulted. At best, that equates a wife to an indentured domestic servant - which she is certainly not. The argument must fail.

The only other basis on which it was put that the commercial rate was inappropriate was that, by reason of Mr. Van Gervan's fear of strangers, no one but his wife could provide the care needed. This is not a matter that detracts from the value of the care provided. On the contrary, it suggests that, in some respects, Mrs. Van Gervan provides care and attention over and above what might be expected from a person whose services were obtained commercially. This argument must also fail.

Because damages were assessed by reference to Mrs. Van Gervan's past earnings, the appeal must be allowed. But it does not follow that there should be a rehearing and reassessment

of damages with respect to the care and services provided by her. The respondent is bound by the way in which the case was conducted at trial *Water Board v. Moustakas* [1988] 62 ALJR 209, per Mason CJ., Wilson, Brennan and Dawson JJ. at p. 211, per Gaudron J. at p. 213; 77 ALR 193, at pp. 196, 199-200 respectively; *Suttor v. Gundowda Pty. Ltd.* [1950] 81 CLR 418, at p. 438; *University of Wollongong v. Metwally* (No. 2) [1985] 59 ALJR 481, at p. 483; 60 ALR 68, at p. 71; *Coulton v. Holcombe* [1986] 162 CLR 1, per Gibbs CJ., Wilson, Brennan and Dawson JJ. at pp. 7-8. Note that in "very exceptional cases" failure to put a point at trial may not be conclusive on appeal: *Maloney v. Commissioner for Railways (NSW)* [1978] 52 ALJR 292, per Jacobs J. at p. 294; 18 ALR 147, at p. 152. And, as already indicated, it was conducted on the basis that the services provided by Mrs. Van Gervan were generally comparable with those that could be obtained through the agency and that the commercial rate for those services was that charged by the agency, namely, $549 per week. Indeed, in his closing address, counsel for the respondent conceded that that was the appropriate basis on which to calculate damages for future care. That concession was withdrawn in the full court, a course that counsel was entitled to take. Even so, it confirms that the trial was conducted on the basis indicated.

The matters which have been advanced in support of the assessment of damages by reference to an amount less than the commercial rate for services of the kind provided by Mrs. Van Gervan are not matters which detract from the value of those services. The proper course is for this court to recalculate damages on the basis that, at the time of trial, the value of those services was $549 per week and to enter judgment accordingly.

I would allow the appeal, set aside the judgment of the full court and stand the matter over to enable the parties to calculate the sum in which judgment should now be entered.

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